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IN THE

Supreme Court of the United States

October Term, 1956

No. 341

HIRSCH LUMBER COMPANY,
Petitioner,

against

WEYERHAEUSER STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 1, 1956.

Opinion Below

The opinion of the Court of Appeals printed on pages 17-25 of Appendix hereto (not reported as of this date).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 1, 1956 (R. 24a) and copies are appended to this petition (p. 26 of Appendix hereto). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The bill of lading provided that the carrier transport the lumber from the State of Washington and deliver same at Newark, New Jersey in consideration of the freight stated therein. Delivery at said point was a condition precedent to the payment of said freight. Over the objection of the cargo owners, the carrier discharged the cargo at Baltimore, Maryland and there demanded and received the full freight—*i.e.* freight for delivery at Newark, New Jersey. The following questions are presented:

(1)

Where a bill of lading makes delivery at the destination set forth therein a condition precedent to payment of freight, is such provision to be given effect notwithstanding another provision in the bill of lading (par. "11" thereof) which provides that the carrier is entitled to the full freight as soon as the cargo is received by the carrier regardless of delivery?

The lower Court completely ignored the first provision favorable to the shipper, and gave full effect to the latter provision favorable to the carrier, thereby refusing to follow the U. S. Supreme Court (see pp. 7-8 hereof).

(2)

Is Title 49 U. S. C. 905(a) which provides that the practices and regulations of the carrier and the provisions of the bill of lading issued by it shall be fair and reasonable, violated by paragraph "11" of the bill of lading which provides that a carrier is entitled to the full freight as soon as it receives the cargo regardless of whether it delivers same at destination set forth therein and even if the carrier completely fails to make delivery.

(3)

Is Title 49 U. S. C. 906, Subdivisions a and c which provides that the carrier shall file schedules of freight charges between certain points and prohibits it from demanding or collecting any different charges, violated by paragraphs 6 and 11 of the bill of lading which require the cargo owners to pay the full freight between the point of origin and the point of destination set forth in the bill of lading, even if the carrier delivers at a point other than said destination or fails to make any delivery?

(4)

Where a carrier claims it is excused from performing by reason of a strike as provided in 46 U. S. C. § 1304(2)(j) is the carrier also entitled to the full freight which is compensation for full performance?

(5)

Whether the plaintiff received a fair trial in view of the trial judges' charge to the jury that the defendant was entitled to the freight as soon as the cargo was received by it and that the plaintiff was not entitled to return thereof. This made judgment for the carrier mandatory without considering any of the issues. Under that charge the jury was to bring in a verdict even if the carrier could have discharged the cargo at Newark, New Jersey. The Court's charge deprived plaintiff of a trial of the issues by the jury.

Statute Involved

The statutory provisions involved are 49 U. S. C. 905, 906; 46 U. S. C. 1304(2j), and 1304(4). They are printed on page 15 of Appendix.

Statement

This action was commenced in the Supreme Court of the State of New York, County of New York and was thereafter removed by defendant to the United States District Court for the Southern District of New York, on the ground of diversity of citizenship.

Hirsch Lumber Company, petitioner herein, is in the wholesale lumber business with an office in New York City. It purchased certain lumber from Simpson Logging Company of Shelton, Washington. The purchase agreement expressly provided that the seller was to procure transportation for said lumber to Independent Terminal, Port Newark, New Jersey (R. 4, Ex. 1).

Pursuant to said agreement the seller delivered the lumber to the Weyerhaeuser Steamship Company (hereinafter referred to as Weyerhaeuser or carrier) the respondent herein, and the latter thereupon issued its bill of lading whereby it undertook to deliver said cargo at the Independent Terminal, Port Newark, New Jersey (R. 4, Ex. 2). The place of discharge or delivery is generally important but with bulky and heavy cargo like lumber, it is extremely important as was established at the trial. The freight stated in the bill of lading was for transportation from Olympia, Washington, where the lumber was received by the carrier, to the Independent Terminal, Port Newark, New Jersey and delivery thereat.

It is of utmost significance on this appeal that the very first paragraph of the bill of lading provides that only on delivery of cargo at the destination set forth in the bill of lading shall the freight be paid. Until that condition is performed there is no obligation to pay such freight. It should also be observed that at the time the carrier received the lumber for transportation, it did not demand, and did not receive payment of said freight and that the bill of lading did not provide for payment of the freight at said

time. The carrier thereafter sent a number of written documents including invoices and various notices. In all these, the carrier stated that the obligation of the petitioner under said bills of lading was to pay the freight after the cargo was discharged at the Independent Terminal, Port Newark, New Jersey (Exs. 5, 26a-26e). The uncontradicted testimony at the trial was that there exists a long, well-established custom in connection with lumber shipments from West Coast to Port Newark to the effect that the carrier is not entitled to the freight except when the cargo is discharged at the destination set forth in the bill of lading and that the carrier and shippers recognize such custom and act in accordance therewith (R. 7, Exs. 5, 26a-26e).

The carrier breached said contract of transportation in that it failed and refused to discharge the lumber at the Independent Terminal, Port Newark. Over strenuous objections of the petitioner and other cargo owners, the carrier directed the vessel to Baltimore, Maryland and there discharged the lumber. Petitioner thereupon demanded that the carrier forward said lumber to Port Newark and thus perform its agreement. However, the carrier insisted that it will deliver the lumber only in Baltimore, and that before the petitioner could get its lumber it must pay the full freight set forth in the bill of lading for delivery at Port Newark. In order to get its lumber the petitioner paid such freight and at its own cost and expense transported the lumber to New Jersey (R. 5-7, 52-56, Exs. 6, 7, 9, 15, 18, 19, 23, 25).

The A. R. Hall Lumber Company and Channel Lumber Company also had lumber on the same vessel and they duly assigned and transferred to the plaintiff their respective claims against defendant (Exs. 10A, 10B and 10C). All these claims are substantially alike, with the exception that the bills of lading issued for lumber to Channel Lumber provided that same shall be discharged at the Atlantic

Terminals Inc., Port Newark, New Jersey, whereas the bills of lading for lumber to be delivered to A. R. Hall, and Hirsch, the petitioner, provided that same be discharged at the Independent Terminal in Port Newark, New Jersey *i.e.* a different pier or terminal in the same city.

At the time of the arrival of the vessel there was a strike of the employees of Atlantic Terminals, Inc. There was no strike or labor difficulties at any other terminal in Port Newark nor anywhere else in the New York Harbor. It was conclusively established that all the lumber could have been delivered either at the Independent Terminal, Port Newark, or at any one of the numerous terminals in Brooklyn, as these were not affected by the strike. As a matter of fact the carrier did discharge in Brooklyn the lumber consigned to other shippers. The carrier did not even make any effort to deliver the lumber involved herein, at the Independent Terminal or in Brooklyn. In view of the conclusiveness of this testimony this must be deemed established as a matter of law. These terminals were the nearest to those specified in the bills of lading. The carrier was therefore not justified in discharging at Baltimore, Maryland—a relatively remote port. (R. 6-8, 11, 12, 15-20; S. M. 66, 84-87, 101, 160, 166, 168, 207, 208, 234, Exs. 6, 7, 9, 15, 18, 19 and 23). See also 46 U. S. C. 1304(4), which makes such discharge unreasonable.

The case was tried before a District Judge and jury. The Court charged the jury that under paragraph 11 of the bill of lading the defendant had fully earned the freight as soon as it received the cargo, that such freight belonged to it and was not to be returned to the plaintiff (S. M. 327, 331, 332, R. 25-26). The jury could not follow those instructions and render a judgment other than for the defendant. According to the learned judge's charge it was not even necessary for the defendant to deliver, or try to do so, or have a lawful excuse for not doing so.

The foregoing instructions by the Court were not merely on an equal basis with other instructions. They were prominent and in the forefront. The Trial Judge interrupted the plaintiff's attorney's summation to emphasize that the foregoing is the rule to be applied herein. The foregoing instructions by reason of their prominence and emphasis and the circumstances under which they were given eclipsed and nullified the other instructions, such as are mentioned in the opinion of the Court of Appeals.

After said charge the jury brought in a verdict for the defendant. On appeal to the Court of Appeals same was affirmed. On this petition we do not intend to deal with issues of fact. We will confine ourselves to questions of law, of national importance. However, we should add that we are not acquiescing in or approving the statement of facts contained in the opinion below, because it contains several important errors.

Reasons for Granting the Writ

(a)

The judgment below is contrary to the decision of the Supreme Court in *Alcoa Steamship Co.* v. *U. S.*, 338 U. S. 421. The carrier in that case relied, as does the respondent here, on the provision in its bill of lading that the freight to destination was due and payable as soon as the goods were received by the carrier, regardless of whether the cargo was delivered. The bill of lading in the *Alcoa* case also expressly provided, as does the bill of lading here, that the freight shall be paid when the cargo is delivered at destination. The Court in the *Alcoa* case in holding that the provision making delivery at destination a condition to the recovery of any freight should control and prevail over the first mentioned provision said, "The United States relies upon * * * the well settled law that freight is never earned until the cargo is delivered." And that in doing

so the United States "only asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get," and further "the law throws on all carriers the risk of performance, for performance is a condition to the shipper's promise to pay, just as performance is always a condition to payment in any contract of service."

Taking an exactly opposite course, the lower Court here gave full effect to paragraph 11 of the bill of lading and completely nullified the provision of the bill of lading herein, requiring the carrier to make delivery at destination as a condition precedent to earning the freight.

The Creuit Court of Appeals, Ninth Circuit, upon facts such as those in the case at bar decided exactly opposite to the lower Court here and denied the freight to the carrier (*Toyo Kisen* v. *W. R. Grace & Co.; Pope & Talbot, Inc.* v. *Guernsey Westbrook*).

The Court below relied on *Allanwilde Transport Corporation* v. *Vacuum Oil Company; International Paper* v. *The Schooner "Gracie D. Chambers," Standard Varnish Works* v. *Steamship "Bris"* all decided at the same time and reported in 248 U. S. However, in those cases the bill of lading provided that the freight must be paid when the carrier received the goods and such freight was actually paid at that time. It did not make delivery at destination a condition precedent to the payment of freight. Such provision would be meaningless where the bill of lading provided for the payment of freight when carrier received the cargo and where such freight was actually paid at that time, and those controlling distinctions were clearly pointed out in the *Alcoa* case and ignored in this case by the Court below. In the case at bar, as already stated, no freight was paid or demanded when the cargo was received by the carrier, no doubt because the bill of lading provided that such freight shall be paid only upon delivery at destination.

If the decision of the lower Court were to prevail, there would be no way in which merchants can contract for the delivery of the cargo at a specific port even though they pay the consideration for delivery thereat. The national importance of this question will be discussed hereafter. The *G. H. Renton* v. *Palmyra* case, decided by the Court of Appeal in England and relied on by the lower Court, is also contrary to the *Alcoa* case as well as the two cases decided by the C. C. A. 9th Circuit hereinbefore mentioned. It should also be noted that the *G. H. Renton* case is now pending before the House of Lords, by permission granted to the shipper to argue his appeal there. This is some indication of the importance of the issues presented by this appeal.

The opinion below misapprehends the issue. The very first sentence thereof states that the issue in this case is whether the bill of lading could lawfully provide that the freight becomes due upon the receipt of the cargo by the carrier. That is not the issue because it fails to take into consideration another very important provision of the bill of lading. As already pointed out, the issue here is, as in *Alcoa Steamship Co.* v. *U. S.*, *supra*, whether a bill of lading provision that the cargo must be delivered at destination as a condition to earning the freight, should be given effect notwithstanding another provision therein (the one discussed by the court below) that the freight becomes due upon receipt by the carrier of the cargo.

Two other errors in the opinion should also be cited here. In certain portions of its opinion, th lower court erroneously assumes there was a strike in the Port of Newark and in the Port of New York. This assumption is important. For if that were correct, the carrier was justified in looking for another port. The conclusive proof, however, is that the strike was confined only to one pier—The Atlantic Terminals Inc. All the other terminals were not affected by the strike. The opinion below also recites

in great detail and makes much ado about the carrier's efforts to unload at a "public terminal" in Newark. How is that relevant? The uncontradicted fact is that the Independent Terminal in Port Newark, to which much of the lumber was consigned, was ready, willing and able to unload all of the lumber involved in this action (see p. 6, *supra*).

(b)

Paragraph 11 of the bill of lading contravenes 49 U. S. C. 905(a) which provides that the rates, regulations and practices of the carrier as well as the provisions of the bill of lading issued by it must be just, fair and reasonable; and declares unlawful and unenforceable any provision in the bill of lading or practice not meeting this requirement.

Paragraph 11 compels the shipper to pay full freight to destination even though the carrier never delivers the cargo and even if the vessel never leaves the port of loading. This is the only specie of transaction where one party gets the full consideration although he fails to perform the services for which the consideration was given. It is a dishonest provision and is contrary to good conscience, fair dealing and the current of enlightened law and has been condemned judicially and in authoritative treatises (*Toyo Kisen* v. *W. R. Grace & Company,* 53 F. (2d) 740 at page 742; *Alcoa Steamship Company* v. *U. S., supra, The Tornado,* 108 U. S. 342; *British & F. Marine Insurance Co.* v. *Southern Pacific Company; 80 Corpus Juris Secondum* (pp. 1065, 1066); *Williston on Contracts,* Rev. Ed. pp. 2346, 2349-50, Sec. 1103).

The legality of paragraph 11 has never been passed upon prior to the enactment of 49 U. S. C. Section 905. The cases prior thereto held that the parties having voluntarily agreed to the insertion of such provision in the bill of lading, the Courts had no power to do anything about it but enforce same. These precedents continued to

be cited after the passage of the above statute without taking into consideration the existence of this law. However, this law gives the Court the power to determine whether such provision as paragraph 11 is just, reasonable and enforceable.

Paragraph 6 of the bill of lading also contravenes 49 U. S. C. 905 (a) because it is unjust and unreasonable. This paragraph 6 sets forth an almost infinite number of circumstances which would excuse the carrier from delivering at destination. Among other things, if it would be more costly to perform or inconvenient to the carrier, it need not perform and yet be entitled to the full freight. It then provides that if any such situation arises or if the carrier apprehends that any such situation might arise, he need not deliver at the port of destination, but can deliver at any other port or return to the port of loading. The carrier could thus deliver the cargo in San Francisco, Galveston or in Cuba and still demand the freight to Newark, New Jersey.

(c)

Paragraphs 6 and 11 of the bill of lading are unlawful because they violate 49 U. S. C. 906, subd. a and c. Said section provides that the carrier shall file with the Interstate Commerce Commission freight rates between stated points, and prohibits the carrier from demanding or receiving any greater or different rate. Under paragraphs 6 and 11 of the bill of lading the carrier can discharge the cargo in San Francisco, Texas or Cuba or fail to leave the loading port and still demand the freight for delivery at Port Newark, New Jersey.

(d)

Title 46 U. S. C. 1304(2)(j) has never been passed upon by this Court. The lower Court misapprehended and misapplied same. It should be noted that the bill of lading

makes no mention of a strike or its effect upon the obligations of the parties. The Carriage of Goods by Sea Act, however, sets forth the rights, duties and obligations of the carrier in the event of a strike. This provision governs and prevails over any provision in the bill of lading 46 U. S. C. 1302 and 1304(2)(j).

The question presented here is, does Section 1304(2)(j) which provides that a carrier shall not be liable for any damages resulting from a strike not only relieve the carrier from any such claim but in addition thereto require the shipper to pay the full freight as though the carrier fully performed. The lower Court's answer in the affirmative is based on a misconception of the law.

The authorities hold that freight is the consideration for the carrier's performance. That a lawful excuse for performance is not the same as performance and the authorities further hold that a provision excusing a party from performance can only be used as a defense to an action wherein it is sought to compel performance, or where damages are sought for failure of performance. The authorities further hold that a clause such as 1304(2)(j) can not be used to procure or keep the consideration for performance (*Premos* v. *Fulton Steel*, 222 F. 945; *The Tornado* case, 108 U. S. 344 at pp. 351-352; *Williston on Contracts* Rev. Ed. § 1103). Thus if A agrees to sell to B lumber for $100, subject to strikes, etc. and thereafter a strike occurs preventing A from performing—then even if B had suffered damages he cannot recover same because performance was made subject to a strike. However, A cannot demand the $100.

The Court below, as already pointed out, erroneously held that not only was the carrier under the provision above mentioned not liable for any damages for its failure to perform, but in addition thereto was entitled to the full freight as though it had fully performed.

(e)

It is obvious that the foregoing questions are of utmost importance to the merchants engaged in selling and shipping lumber from the West Coast of the United States to the Eastern States. This is one of the large industries of this nation. As the uncontradicted testimony at the trial proved, a custom has been in existence for a long time requiring the carrier to deliver the lumber to the port of discharge as a condition to demanding the freight. The industry believed that the bill of lading provision herein making delivery at destination a condition precedent to the payment of freight, gave effect to that custom (R. 7) until the decision in the case at bar. Under that decision there will be no way in which a seller and buyer can contract for delivery at the specific port desired by them. Nor would they have any way of compelling the carrier to perform the services for which it is paid. Here the parties had obtained a specific agreement from the carrier that he will deliver at Port Newark and that it will be paid the freight charged by it, when the cargo would be thus delivered. There was nothing further the parties could do to insure delivery at Port Newark.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ISIDOR ENSELMAN,
Counsel for Petitioner.

MAX ORNSTEIN,
Associate Counsel.

AUGUST 1, 1956.

APPENDIX

Statutes Involved

TITLE 49 U. S. C. 905(a):

> "It shall be the duty of every common carrier by water, * * * to establish, observe, and enforce just and reasonable rates, fares, charges and classifications, and just and reasonable regulations and practices, relating thereto and to the issuance, form, and substance of tickets, receipts, bills of lading, and manifests. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

TITLE 49 U. S. C. 906:

> "(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, * * *
>
> (c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation * * * than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; * * *"

TITLE 46 U. S. C. 1304(2j):

> "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting

from—(j) strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts."

TITLE 46 U. S. C. 1304(4):

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 338—October Term, 1955

(Argued April 12, 1956—Decided June 1, 1956)

Docket No. 23995

HIRSCH LUMBER COMPANY,

Plaintiff-Appellant,

v.

WEYERHAEUSER STEAMSHIP COMPANY,

Defendant-Appellee.

Before:

CLARK, *Chief Judge*,
HINCKS and LUMBARD, *Circuit Judges*.

Hirsch Lumber Company, the purchaser and assignee of bills of lading made subject to the Carriage of Goods by Sea Act, sued the carrier, Weyerhaeuser Steamship Company, for return of $33,837.32 paid in freight for delivery of lumber at Port Newark, New Jersey, which lumber was unloaded at Baltimore, Maryland due to a strike at Port Newark and the Port of New York during January 1955.

Plaintiff appeals from a jury verdict for the defendant in the Southern District of New York, Vincent L. Leibell, District Judge. Affirmed.

MAX ORNSTEIN, New York City, for plaintiff-appellant.

DOW & SYMMERS, New York City (William G. Symmers, Frederick Fish, William Warner, of counsel on the brief), for defendant-appellee.

LUMBARD, *Circuit Judge*:

This appeal raises two questions: First, whether bills of lading under which lumber was to be carried by sea from Olympia, Washington to Port Newark, New Jersey, could lawfully provide that freight was immediately due upon delivery of the lumber to the carrier even though the lumber was not delivered to point of destination because of a strike at Port Newark. The second question is whether there was evidence to sustain the jury's finding that the carrier's delivery of the lumber to Baltimore because of the strike was a reasonable diversion under the Carriage of Goods by Sea Act, 46 U. S. C. A. § 1304, and the provisions of the bills of lading.

Hirsch Lumber Company was the purchaser of one bill of lading and the assignee of the purchasers of seven other bills of lading, all covering shipments from Olympia, Washington to Port Newark, New Jersey, on the Western Trader, a liberty ship under $50,000 per month time charter to the carrier, Weyerhaeuser Steamship Company. Hirsch sued for return of freight paid in the total of $33,827.32, with interest and other charges, on the ground that Weyerhaeuser had not earned the freight because it failed to deliver the lumber at Port Newark. In the alternative Hirsch sought the reasonable cost of transporting the lumber from Baltimore to Port Newark, plus handling and terminal charges, which allegedly totalled approximately $34,850.

The Western Trader arrived at New York Harbor on January 3, 1955 and completed discharging lumber not covered by Hirsch's bills of lading at Brooklyn on Janu-

ary 6. Her next port of discharge was to be Atlantic Terminals, Port Newark, and her final port was Independent Terminals, also at Port Newark.

Commencing January 3 a picket line had been established at Atlantic Terminals by striking lumber-handling employees who were members of Local 478 Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. At this time the steamship W. L. McCormick, owned and operated by Weyerhaeuser, was berthed at Atlantic Terminals, having arrived with a cargo of lumber on January 1. When the McCormick was shifted to Bayway Terminals in Port Newark on January 4 a picket line prevented her unloading there. After the Western Trader had unloaded her Brooklyn cargo she anchored off Staten Island on January 6 and remained there until January 14. The strike continued until April 5, 1955.

Considerable evidence was introduced by Weyerhaeuser tending to show that there was good reason to conclude that the lumber could not have been discharged at Port Newark or elsewhere in the Port of New York. Various of defendant's employees testified that representatives of the union on strike had stated that they would establish a picket line at any place where any vessel with cargo consigned to Atlantic Terminals might berth. As already stated, pickets had followed Weyerhaeuser's McCormick to Bayway Terminals in Port Newark on January 4 and had thereby prevented her unloading there. Not all of the lumber covered by the bills of lading involved here was consigned to Atlantic Terminals, but there was evidence to show that the Western Trader was so loaded that the Atlantic Terminals lumber had to be discharged before any of the other lumber could be reached.

On January 6 Weyerhaeuser commenced an action against the officers of the striking union in the District Court for New Jersey. An application for an injunction against picketing any of Weyerhaeuser's vessels at Newark

or in the Port of New York, heard on January 12 by order to show cause signed on January 7, was denied on the ground that the National Labor Relations Board had primary jurisdiction. Following this, on January 13, Weyerhaeuser filed a complaint with the Board.

Captain Lawrence Howard, a vice-president and director of Weyerhaeuser, testified that he sought permission of the Port of New York Authorty to berth the Western Trader at a puble terminal pier in Port Newark, but that this was refused. This was corroborated by Captain Robert Schulze, general manager of the Marine Operations Division of the Port of New York Authority. Edward J. Carroll, general superintendent of the Nacirema Operating Company, who was a member of the Conference Committee of the New York Shipping Association, which represents the shipping companies in negotiating collective bargaining agreements with the International Longshoremen's Association, also testified for the defendant. He was handling the unloading of the McCormick and the Western Trader and he contacted various officials of the I. L. A. in an effort to get the ships unloaded. Each official with whom he talked advised him that the longshoremen would respect a picket line.

After the failure of all these attempts to find a means of unloading in Newark or the Port of New York Weyerhaeuser learned that labor in Baltimore would not honor pickets from Newark. Accordingly the Western Trader left New York on January 14 and steamed to Baltimore where she commenced discharging the lumber on January 15. The pickets did follow the Western Trader to Baltimore and established a picket line at the terminal there, but despite this the lumber was unloaded.

The plaintiff sought to show that part or all of the Western Trader's lumber could have been unloaded at the Independent Terminals in Port Newark or the Gowanus Terminals in Brooklyn. Thus Mr. Hall, president of the

Independent Terminals testified that he was ready, willing and able to berth and unload the Western Trader. He qualified this, however, by stating that he would not have attempted to unload "hot cargo" consigned to the Atlantic Terminals. Mr. Garbutt, terminal manager of the Gowanus Terminals, testified that in his opinion the Western Trader could have been unloaded at his Terminals in Brooklyn.

The eight bills of lading all provided that the lumber was to be delivered at Port Newark, New Jersey and they all contained the word "Collect" next to the amount of the freight indicating that the freight was to be paid on delivery. They provided in Clause 11:

> "Freight, whether prepaid or collect, becomes wholly due and belongs absolutely to Carrier as soon as the Goods are received by Carrier, and shall be deemed earned, and if prepaid shall not be returnable, and if collect shall be payable, ship and/or cargo lost or not lost."

They provided further in Clause 6 that in case of any event which in the judgment of the carrier or master is likely to make it unsafe or imprudent

> "* * * for any reason * * * to * * * discharge the cargo at the port of discharge, or to give rise to delay or difficulty in * * * discharging at * * * the port of discharge, the master, either with or without * * * attempting to * * * discharge the goods there * * * may * * * stop at such place as he or the Carrier may consider safe or advisable under the circumstances * * * and there discharge the cargo * * * and when so discharged the cargo shall be at the risk and expense of shippers and/or consignees or receivers, and delivery thereof by the Carrier shall be considered complete and the Carrier

> shall be freed from any further responsibility in respect thereof; * * * The forwarding of cargo from a port of distress or other place where there has been a forced interruption or abandonment of the voyage shall be at the expense of the shipper and consignee of the goods, * * *."

By Clause 1 of the bills of lading incorporated the Carriage of Goods by Sea Act, 46 U. S. C. A. §§ 1300-1315, which provides in § 1312 that a bill of lading which covers a carriage of goods between seaports of the United States may provide that it is subject to this Act. Sec. 1304(2)(j) provides that the carrier shall not be responsible for loss or damage resulting from "strikes * * * or stoppage or restraint of labor from whatever cause, whether partial or general: * * *." The Act further provides in § 1304(4) that a reasonable deviation shall not be deemed a breach of the contract of carriage and that a deviation for the purpose of unloading cargo shall prima facie be regarded as unreasonable.

If these provisions of the bills of lading are lawful, the carrier may retain the entire freight if failure to deliver the lumber at Port Newark was reasonable under the circumstances, and if it was reasonable to have unloaded the lumber at Baltimore on January 15, 1955.

Judge Leibell ruled that the provisions of the bills of lading were valid and accordingly instructed the jury that Weyerhaeuser was entitled to the freight for the carriage of the lumber if it sustained the burden of showing that delivery of the lumber to Baltimore was reasonable because of the strike and the labor stoppage at Port Newark and the Port of New York. We agree with Judge Leibell that the provisions of the bills of lading are valid. That bills of lading may provide that freight is earned even

though the cargo is not delivered to the designated port is well established. Alcoa Steamship Co. v. United States, 338 U. S. 421, 422 (1949); Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377 (1919); International Paper Company v. The Schooner "Gracie D. Chambers", 248 U. S. 387 (1919); Standard Varnish Works v. Steamship "Bris", 248 U. S. 392 (1919).

Under the Carriage of Goods by Sea Act a reasonable deviation to unload cargo does not subject the carrier to liability for any loss or damages resulting, although the carrier has the burden of showing that it was reasonable. 46 U. S. C. A. § 1304(4). If the carrier can show that the deviation was due to a strike or stoppage or restraint of labor, the same Act expressly provides that he shall not be responsible for resulting loss. 46 U. S. C. A. § 1304 (2)(j). In Kroll v. Silver Line, Ltd., 116 F. Supp. 443 (N. D. Cal. S. D., 1953) where the bills of lading contained provisions similar to those here in question, the District Court held it reasonable to deliver cargo enroute from Calcutta to Los Angeles, at Tacoma, Washington, the nearest open port to Los Angeles, which, with other ports, was closed by the general Maritime strike of 1948. The Court found it unnecessary to resort to the Carriage of Goods by Sea Act since there was no deviation; the contract expressly sanctioned an alternate place of delivery in the event of labor trouble. The libellants were denied recovery of their costs in transporting the cargo to Los Angeles from Tacoma.

A December 1955 decision of the Court of Appeals of England in G. H. Renton & Co., Ltd. v. Palmyra Trading Corporation of Panama reported in Weekly Law Reports for January 20, 1956 (1956) 2 W. L. R. 232, deals with a somewhat similar diversion of a shipment of timber from British Columbia to London and Hull under bills of lading providing that with respect to goods loaded in Canada the Water Carriage of Goods Act, 1936, of the Dominion of

Canada [1] shall be effective. In that case the agreed facts were that the carrier unloaded the lumber at Hamburg, conceded to be the nearest convenient port if discharge at any port other than London and Hull was lawful, because it was impossible to discharge the cargo at London and Hull due to strikes and labor troubles. The bill of lading contained provisions as follows:

> 14(c) "Should it appear that * * * labour troubles * * * would prevent the vessel from * * * entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at the port of loading or any other safe and convenient port."
>
> 14(f) "The discharge of any cargo under the provisions of this clause shall be deemed the fulfillment of the contract."

The Court of Appeals held the carrier had made proper delivery under its contract and was not liable for any expenses or losses incurred by the shipper by reason of discharge of the lumber at Hamburg. Thus whether we rely on the Carriage of Goods by Sea Act or merely on paragraphs 6 and 11 of the bills of lading we must conclude that if the carrier acted reasonably in proceeding to Baltimore it is entitled to its freight.

---

[1] The Canadian Act of 1936, the British Act of 1924, and laws of other countries, like our own statute of 1936, 46 U. S. C. A. §§ 1300-1315, were all adopted following the Brussels Convention of 1924 and the adoption by many countries of the "Hague Rules". The purpose of these conventions and acts was to simplify and make uniform the provisions of ocean bills of lading and the rights of shippers and carriers. See Note, 23 Va. Law Rev. 590 (1937). See also 1 Benedict on Admiralty 291-92 (6th ed. 1940); 6 Benedict on Admiralty 154 et seq. (6th ed. 1941). Although our act covers only foreign commerce, it may be incorporated into domestic bills of lading as was done in the case at bar. 46 U. S. C. A. § 1312.

Judge Leibell fairly and correctly left to the jury the reasonableness of Weyerhaeuser's discharge of the lumber at Baltimore. After summarizing the pertinent provisions of the bills of lading and the sections of the Act, including that which provided that a deviation to unload cargo was prima facie to be regarded as unreasonable, he charged that "the propriety of the deviation is a fact question of inherent reasonableness depending on all the surrounding circumstances." And after summarizing the evidence he charged:

> "If you conclude that the carrier was justified in deciding that it could not make delivery in Port Newark or the Port of New York and that Baltimore was the nearest port at which the carrier could be reasonably sure of making delivery, then the deviation in the voyage of the Western Trader from New York to Baltimore was reasonable and proper, or you may so conclude."

And he again charged as to burden of proof that it was upon the defendant "to show that the deviation was reasonable under all the circumstances * * * by a fair preponderance of the evidence." After the conclusion of the main charge, and at the plaintiff's request, this instruction as to burden of proof was repeated by the Court.

Thus, after a clear, careful and thorough charge from the Court, the jury found for the defendant. There was ample evidence to justify their verdict and the judgment is affirmed.

Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of June, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
Circuit Judges.

HIRSCH LUMBER COMPANY,
Plaintiff-Appellant,

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellee.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U
FILED
SEP 14 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 341

HIRSCH LUMBER COMPANY,
Petitioner,

against

WEYERHAEUSER STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTE:

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In the

Supreme Court of the United States

October Term, 1956

Hirsch Lumber Company, *Petitioner,* against Weyerhaeuser Steamship Company, *Respondent.*	No. 341

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (pp. 17-25 of Petition) is not yet reported.

Jurisdiction

The jurisdictional requisites are set forth in the Petition.

Questions Presented

I

Whether bills of lading under which lumber was to be carried by sea from Olympia, Washington to Port Newark, New Jersey could lawfully provide that freight was immediately due upon delivery of the lumber to the carrier even though the lumber was not delivered to point of destination because of a strike at Port Newark.

II

Whether there was evidence to sustain the jury's finding that the carrier's delivery of the lumber to Baltimore because of the strike was a reasonable diversion under the Carriage of Goods by Sea Act, 46 U. S. C. A. sec. 1304, and the provisions of the bills of lading.

Statute Involved

The statutory provisions involved are sections 1210(2)(j), 1210(4) and 1212 of 49 Stat. §§ 1207-1213, 46 U. S. C. §§ 1300-1315, of the Carriage of Goods by Sea Act, 1936, Act of April 16, 1936. They are printed in Appendix A, *infra*, p. 10.

Statement

This litigation involving eight (8) bills of lading arose out of the inability of the respondent, Weyerhaeuser Steamship Company, to deliver lumber carried by sea from Olympia, Washington at Port Newark, New Jersey because of a strike at the latter port. The lumber was delivered at Baltimore, Maryland. The petitioner, Hirsch Lumber Company, brought suit in its own behalf as purchaser of one of the

bills of lading and as the assignee of the alleged claims of A. R. Hall Lumber Company and Channel Lumber Company, purchasers of other bills of lading.

The steamship WESTERN TRADER, a liberty ship under time charter to the respondent, Weyerhaeuser Steamship Company, loaded a full cargo of lumber in November and December, 1954 at ports on the West Coast of the United States for Brooklyn, New York and Port Newark, New Jersey. She arrived at New York Harbor on January 3, 1955 and moored at a pier at the foot of Green Street, Brooklyn. She completed discharging lumber destined for Brooklyn on January 6, 1955. She was stowed so that her next port of discharge was Atlantic Terminals, Port Newark, New Jersey and her final port of discharge was Independent Terminals, Port Newark, New Jersey. Only part of the lumber scheduled for discharge at Port Newark was carried under the bills of lading involved here. Because of a strike by certain lumber handling employees of the Atlantic Terminals, Port Newark, the WESTERN TRADER proceeded to an anchorage off Stapleton, Staten Island, New York on January 6, 1955 where she remained until January 14, 1955. [R. 1a-2a]

The strike began on January 1, 1955. The employees involved were members of Local 478, Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. who stack and "back-pile" lumber after it is discharged from a vessel to the wharf. The picket line was established by the striking workers at Atlantic Terminals, Port Newark on January 3, 1955. The strike continued until April 5, 1955 when a new collective bargaining agreement was entered into between the Atlantic Terminals and the union involved which represented the lumber handlers. [R. 2a-3a]

When the strikers began picketing at Atlantic Terminals, Port Newark, New Jersey on January 3, 1955 the steamship

W. L. McCormick, a liberty ship owned and operated by the respondent, Weyerhaeuser Steamship Company, was berthed at Atlantic Terminals. She had arrived from the West Coast of the United States with a full load of lumber on Saturday, January 1, 1955. An attempt was made to circumvent the picket line by shifting the McCormick from Atlantic Terminals to Bayway Terminals in Port Newark on January 4, 1955. The pickets followed the McCormick to Bayway Terminals and established a picket line which was recognized and respected so that no lumber could be discharged from the McCormick at Bayway Terminals. Members and representatives of the collective bargaining group on strike stated on several occasions that they would establish a picket line at any place where any vessel with cargo consigned to Atlantic Terminals berthed. In fact they did follow the Western Trader to Baltimore as set forth below. [R. 4a-6a]

On January 6, 1955 the respondent filed a complaint in the United States District Court for the District of New Jersey against the officers of the union on strike. On January 7, 1955 the Court signed an order returnable January 12, 1955 to show cause why the striking union should not be restrained from picketing any vessel owned or chartered and operated by the respondent at the Port of Newark in the State of New Jersey and the Port of Greater New York. The application of the respondent for an injunction against the officers of the striking union was denied on the grounds that the Court lacked jurisdiction because the proceeding was one over which the National Labor Relations Board had jurisdiction both to entertain the grievance and determine it fully. The respondent also filed a complaint against the striking union with the National Labor Relations Board on January 13, 1955. [R. 6a-8a]

In addition, the respondent requested permission from the Port of New York Authority to berth the Western

TRADER at one of the public terminal piers in Port Newark. The Port Authority refused to permit the respondent to dock the WESTERN TRADER or any vessel with lumber scheduled for discharge at Atlantic Terminal aboard at any of its public terminal berths. Independent Terminal's berth and Bayway Terminal's berth are public terminal berths. [R. 8a-10a]

Moreover, the respondent through the New York Shipping Association, which represents management in collective bargaining with the International Longshoremen's Association and its affiliated crafts in the shipping industry, endeavored to arrange for the discharge of the WESTERN TRADER in the Port of Greater New York without success. The respondent also caused inquiries to be made of the representatives of the locals of the International Longshoremen's Association in different areas of New York Harbor and were advised that the longshoremen would respect a picket line. [R. 10a-12a]

Finally assurances were received by the respondent from Baltimore that a picket line from Newark would not deter labor in Baltimore from discharging the vessel. The WESTERN TRADER weighed anchor and proceeded to Baltimore on January 14, 1955. The MCCORMICK was also sent to Baltimore. Members of the striking local kept their threat and went from Port Newark to Baltimore and established a picket line at the lumber terminal in Baltimore where the WESTERN TRADER and the MCCORMICK were berthed. The workmen in Baltimore ignored the picket line and both vessels were discharged. [R. 5a, 12a-13a]

The action was tried before a jury in the United States District Court for the Southern District of New York. The jury rendered a verdict for the defendant. The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court.

Argument

The decision of the lower court turns solely upon an analysis of the particular facts involved which was decided adversely to the petitioner by a jury. There is no issue to warrant review by this Court. The petitioner does not cite any litigation pending in our courts involving the issue presented. Indeed, despite the frequent strikes on the American waterfront and the consequent diversions of cargo to ports other than their original destination, there is only one reported case involving the point raised here since the Carriage of Goods by Sea Act was passed twenty years ago. *Kroll et al.* v. *Silver Line, Limited, et al.* (N. D. Cal., S. D. 1953) 116 F. Supp. 443.

I

THE DECISION BELOW IS CLEARLY CORRECT

It is expressly permitted by § 1312 of the Carriage of Goods by Sea Act, 46 U. S. C. §§ 1300-1315 to make a bill of lading covering carriage between United States ports subject to the Act. Clause 1 of the bills of lading involved incorporated the Carriage of Goods by Sea Act. Sec. 1304 (2)(j) of the Act provides that the carrier shall not be responsible for loss or damage resulting from "strikes * * * or stoppage or restraint of labor from whatever cause, whether partial or general; * * *". The Act further provides in § 1304(4) that a reasonable deviation shall not be deemed a breach of the contract of carriage and that a deviation for the purpose of unloading cargo shall *prima facie* be regarded as unreasonable. Under the Act the carrier is not liable for any loss or damage resulting from a reasonable deviation to unload cargo, although the carrier has the burden of showing that it was reasonable.

In the District Court the reasonableness of the respondent's discharge of the lumber at Baltimore was left to the jury. There was ample evidence to justify the jury's verdict for the respondent.

II

THERE IS NO CONFLICT OF DECISION

Ocean bills of lading clauses providing that freight shall be earned although the goods are never delivered to the designated port have been repeatedly sustained. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377 (1919); *International Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387 (1919); *Standard Varnish Works* v. *The Bris*, 248 U. S. 392 (1919).

In *Alcoa Steamship Co.* v. *United States*, 338 U. S. 421 (1949), the Court said:

> "It is a principle of American maritime law that ocean carrier freight charges are not earned unless and until the goods are delivered to destination. But contractual provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carriers' bills of lading." (p. 422)

In the *Allanwilde* case, 248 U. S. 377 (1919), Mr. Justice McKenna for the Court said:

> "The provision was not idle or accidental. It is easy to make a charge of injustice against it, if we consider only the defeat of the voyage and non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both." (p. 385)

Accordingly, the clauses in the bills of lading providing that the freight shall be earned although the goods are not delivered to the designated port are valid. The pertinent provisions of the bill of lading are set forth in Appendix B, *infra*, pp. 11-12.

The decisions cited by petitioner are not in conflict with the decision of the Court below. In *Alcoa Steamship Co.* v. *United States*, 338 U. S. 421 (1949) the Court construed two documents, the carrier's commercial form bill of lading and the controlling government form bill of lading. The Court found that the terms of the government bill of lading were inconsistent with the "freight earned" clause in the carrier's commercial form bill of lading and, therefore, that the United States was not liable for the freight. At bar we are only concerned with the carrier's bill of lading which contains a valid "freight earned" clause. There is no other contract. In *Toyo Kisen* v. *W. R. Grace & Co.* (9th Cir. 1931), 53 F. 2d 740, affirming 48 F. 2d 850 (D. C. N. D. Cal., S. D. 1931), a prior written contract between the shipper and the ocean carrier eliminated the "freight earned" clause from the bill of lading. The Court found that if there is any irreconcilable repugnancy between a prior written contract between the shipper and ocean carrier and bills of lading, it must be resolved in favor of the former. Similarly in *Pope & Talbot, Inc.* v. *Guernsey Westbrook* (9th Cir. 1947), 159 F. 2d 139, the Court construed an acceptance of a C. I. F. contract for the purchase of lumber together with a bill of lading and held that in view of the ambiguity of the typed and printed form portions of the contract the "freight earned" clause of the bill of lading was inapplicable. The decision of the Court of Appeal of England in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*, [1956] 1 Q. B. 462 is in complete harmony with the decision below.

Conclusion

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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September, 1956

APPENDIX A

Statutory Provisions from the Carriage of Goods by Sea Act, Act of April 16, 1936, 49 Stat. §§ 1207-1213, 46 U. S. C. A. §§ 1300-1315:

"* * * Nothing in this chapter and section 25 of Title 49 shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and section 25 of Title 49, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter and section 25 of Title 49 * * *" 49 Stat. 1212, 46 U. S. C. A. 1312.

* * * * * * *

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *" 49 Stat. 1210(2) (j), 46 U. S. C. A. 1304 (2) (j);

* * * * * * *

"Deviations"

"(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable." 49 Stat. 1210(4), 46 U. S. C. A. 1304 (4)

APPENDIX B

Clause 6 of the bill of lading provides:

"In case of the happening of any matter or event whether existing or anticipated before the commencement of or during the voyage which in the judgment of the Carrier or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the vessel or any part of the cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage, or to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge, the master, either with or without proceeding toward the port of discharge or entering or attempting to enter or discharge the goods there may proceed or return to or stop at such place as he or the Carrier may consider safe or advisable under the circumstances, once or oftener in any order or rotation and there discharge the cargo or any part thereof, and when so discharged the cargo shall be at the risk and expense of shippers and/or consignees or receivers, and delivery thereof by the Carrier shall be considered complete and the Carrier shall be freed from any further responsibility in respect thereof; or if the Master considers it advisable he may retain the cargo on board until the return trip or so long as the Carrier thinks advisable. For any services rendered to the goods as hereinabove provided, the Carrier shall be entitled to a reasonable extra compensation above the full bill of lading freight. If the vessel arrives at the original port of discharge and is prevented or delayed by quarantine from discharging the goods at the usual place of discharge, the Carrier forthwith and without notice may discharge the goods into any depot, lazaretto, craft or other place and such discharge shall be a complete delivery under this contract and all expenses thereby incurred with respect to the goods shall be for ac-

count of the goods. The forwarding of cargo from a port of distress or other place where there has been a forced interruption or abandonment of the voyage shall be at the expense of the shipper and consignee of the goods, who shall be jointly and severally liable for all freight and charges and expenses of every kind whatsoever whether payable in advance or not that may be incurred by the cargo in addition to the original freight, whether the services be performed by Carrier's own vessels or by strangers, and all such expenses and charges shall be due and payable day by day immediately when they are incurred."

Clause 11 of the bill of lading provides:

"Any freight or other charges advanced by Carrier and any expense incurred by Carrier for Cargo Owner's account, shall become immediately and irrevocably due from and repayable by Shipper. Freight, whether prepaid or collect, becomes wholly due and belongs absolutely to Carrier as soon as the Goods are received by Carrier, and shall be deemed earned, and if prepaid shall not be returnable, and if collect shall be payable, ship and/or cargo lost or not lost. Full freight is payable on damaged and unsound Goods, whether deliverable in specie or not. Carrier may sell or dispose of perishable property for Shipper's account whenever in Carrier's opinion same would become decayed or deteriorated before it could be delivered. In such case full freight and all charges shall be deemed earned and shall be payable by Shipper as above."